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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PHILIP J. MARTINET, Individually, On Behalf of All Others Similarly Situated, and on Behalf of the General Public, Plaintiff, v. SPHERION ATLANTIC ENTERPRISES LLC, a Delaware Limited Liability Company; and DOES 1 through 50, inclusive, Defendant.	Case No. 07 CV 2178 W (AJB) **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(c)** **Date:** **May 16, 2008** **Time:** **10:00 a.m.** **Courtroom:** **A – First Floor** **Judge:** **Hon. Anthony J. Battaglia**

I. INTRODUCTION

Defendant Spherion Atlantic Enterprises, LLC ("Spherion") seeks a protective order pursuant to Federal Rule of Civil Procedure 26(c) prohibiting plaintiff Philip Martinet from propounding or compelling oppressive and burdensome state-wide class discovery. In support of its Motion for a Protective Order ("Motion"), Spherion produced substantial evidence from multiple company witnesses establishing that state-wide class discovery would be an enormously expensive fishing expedition that would have no chance of supporting Martinet's class allegations. In his opposition, Martinet produces no evidence (not even a declaration on information and belief) tending to prove that class discovery would support his class allegations.

The primary question on this motion is whether the Court should permit oppressive and burdensome class discovery in the absence of any showing from plaintiff that such discovery is likely to substantiate class allegations. The answer to this question is a resounding "no."

Ninth Circuit law prohibits class discovery when plaintiff cannot make a prima facie showing of the class action requirements. By not submitting any evidence demonstrating that class-wide discovery will substantiate his class allegations, plaintiff has failed to meet the lowest of thresholds required to move forward with class discovery. The Court should prevent plaintiff's fruitless fishing expedition and issue the requested protective order.

Rather than submit evidence demonstrating that class-wide discovery will support his allegations, plaintiff attempts to distract the Court from the core issue in three ways. First, plaintiff alleges that the parties have not fully met and conferred. However, the parties have fully met and conferred on the global dispute over class discovery (in writing and telephonically) such that further conferring on individual discovery requests would be futile.

Next, plaintiff alleges that defendant failed to keep required records. But Spherion did keep required wage-and-hour records.[1] The records, however, are unique to thousands of different employees in highly variable working conditions and are scattered throughout the state. The discovery of these records would be unduly burdensome and oppressive and would undermine plaintiff's class allegations rather than support them.

Finally, plaintiff attacks Spherion's motion by citing a litany of inapposite wage-and-hour cases that do not address the primary question at issue. No matter how many cases plaintiff cites, it will not change the fact that he has not met his burden to obtain class discovery.

II. LEGAL ARGUMENT

A. Spherion Satisfied Rule 26(c) And Local Rule 16.5 Confer Requirements.

Rule 26(c) states that a motion for protective order "must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Local Rule 16.5(k) provides that "[c]ounsel shall 'meet and confer' prior to filing any discovery motion and shall seek to resolve the matter informally." The "dispute" and/or "matter" at issue on Spherion's Motion is whether plaintiff is

[1] The Court should disregard Plaintiff's attempt to build a case of record destruction based on out of context statements in Spherion's declarations. Spherion's declarations discuss the manner in which documents were kept and the difficulty of retrieving those documents in class discovery. Nowhere does Spherion admit or suggest it failed to keep required documents.

entitled to obtain state-wide class discovery. The parties met and conferred about this dispute on several occasions (including telephonically) and reached an impasse.

In support of its motion, Spherion's counsel submitted a declaration certifying that they had attempted to confer with plaintiff's counsel to resolve the dispute on several occasions to no avail. *See* Declaration of Brandon McKelvey in Supp. of Def's Motion ("McKelvey Decl.") ¶¶ 4, 7, 8, 11-13. Plaintiff's counsel has not submitted a declaration or affidavit to the contrary. Nor has counsel asserted that further confer efforts would be helpful to resolving the dispute over class discovery. More importantly, the record demonstrates the parties conferred as much as possible on the issue of state-wide class discovery and agreed, in front of the Court, that no further meet and confer was necessary on this issue. *See* McKelvey Decl. 4, 7, 8, 11-13.

Plaintiff argues in his opposition that Spherion only satisfied Rule 26(c)'s confer requirements with respect to plaintiff's Special Interrogatory Number 1 and Request for Production of Documents Number 3. (Opposition at p. 3.) This is an unreasonably myopic characterization of the dispute at issue and the meet-and-confer correspondence between the parties. Although the dispute at issue was initially identified with respect to Special Interrogatory Number 1 and Request for Production of Document Number 3, Spherion made clear in both correspondence to plaintiff and the Court that Spherion was objecting to all state-wide class discovery.[2]

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[2] After plaintiff propounded class-wide discovery, the parties met and conferred via telephone at the end of February regarding discovery issues and agreed there was a dispute as to state-wide class discovery that required court resolution. The parties raised the discovery dispute in their Joint Discovery Plan, submitted to the court on March 10:

> Defendant contends…pre-class certification discovery seeking information relating to thousands of its state-wide employees at hundreds of different offices and franchises is unreasonably broad, unduly burdensome, and irrelevant to certification of a class common to the Plaintiff. […] Defendant anticipates moving for a protective order under Rule 26(c) because of the extreme burden posed by Plaintiff's discovery requests.

At the Case Management Conference on March 21, Spherion again stated its objection to class discovery and the parties agreed, in front of the Court, that no further meet-and-confer efforts would be fruitful as to this dispute. Thereafter, defense counsel confirmed in writing that no further meet-and-confer efforts were necessary. (*See* McKelvey Decl. ¶¶ 4, 7,8, 11-13.)

The "dispute" at issue is a global one that applies equally to each of plaintiff's discovery requests seeking state-wide class information. The parties have met and conferred both in writing and electronically on the this dispute. There is no requirement that Spherion and plaintiff confer on each discovery request separately based on the same issue or dispute. This would be fruitless and lead to the same result. Spherion's objections to the state-wide scope of Special Interrogatory Number 1 and Request for Production of Documents Number 3 are the same as its objection to each of the other discovery requests.[3]

The legal and factual arguments in Spherion's motion for protective order (and plaintiff's responses to those arguments) are the same for each of the propounded class discovery requests. Because the parties disagree on the fundamental and global issue of whether class discovery is permitted in this case there is no negotiation or give and take to be done on each individual request.[4] As such, requiring the parties to further confer on the same issue with respect to different requests would be a futile exercise. The meet and confer requirements of Rule 26(c) and Local Rule 16.5(k) have been satisfied and the Court should consider all of plaintiff's discovery requests that seek state-wide class discovery in ruling on Spherion's Motion.

B. Martinet Has Failed To Make A Rule 23 Prima Facie Showing.

In support of its Motion, Spherion submitted multiple declarations from company witnesses establishing that plaintiff's class accusations were baseless and that plaintiff's class case was doomed to fail. Spherion called plaintiff out on numerous vague allegations based on "information and belief" and challenged Martinet to come forward with even the slightest bit of evidence supporting his allegations. (*See* Motion at p. 14, *citing* McKelvey Decl. ¶¶ 2-3, Exhibits A and B ¶¶ 32-34, 37-38, 41-43, 46-47, 52, 57, 59, 64, 66; Exhibit B ¶ 68.) In response to this challenge, plaintiff did not submit a single piece of evidence or testimony to substantiate his class allegations. Neither plaintiff nor his counsel submitted a declaration stating the basis for their supposed "information and belief." No evidence was submitted to show that, if discovery was permitted, it would substantiate plaintiff's class claims. Plaintiff has completely failed to meet what is a very low burden of establishing a prima facie showing of the class action requirements. *See Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

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[3] *See* McKelvey Decl.¶¶ 14-15, Exhibits M & N pgs. 114-151 (Exhibit A through N were numbered sequentially from 1 to 151). Spherion's response to document request number 3 (Ex. M pgs. 116-117) is the same as its responses to class document requests numbered 4, 6, 7, 8, 10-13, 15-21 (Ex. M pgs. 117-131). Similarly, defendant's response to special interrogatory number 1 (Ex. N pg. 137) is the same as its responses to class interrogatory numbers 2 through 13 (Ex. N pgs. 137-148). The same objections and dispute over class discovery apply equally to all the requests.

[4] Martinet's Opposition references the fact that he is willing to accept a statistical sampling of records. This is premature because plaintiff has not established a prima facie showing of the class action requirements entitling him to class discovery in any form. *See* Section II. B. *infra*.

Plaintiff takes the position that he need not submit a credible explanation as to how class-wide discovery will support his allegations. Instead (as plaintiff would have it), Spherion should go through the enormous effort of producing thousand of unrelated and unique employment documents for thousands of its diverse employees, and then Plaintiff will tell the Court what his allegations are based upon. This is precisely the type of fishing expedition that is forbidden in the Ninth Circuit. *See Rivera v. NIBCO, Inc.* 364 F.3d 1057, 1072 (9th Cir. 2004); *Mantolete, supra*, 767 F.2d. at 1424; *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985).

Plaintiff attempts to, but cannot, distinguish and minimize well-established Ninth Circuit law the requires a prima facie showing under Rule 23 before class discovery can proceed.[5] Despite plaintiff's arguments to the contrary, *Mantolete v. Bolger* is applicable and similar to Martinet's case. In that case, the plaintiff alleged an expansive class consistingof United States Postal Service employees and sought nation-wide class discovery. The Ninth Circuit affirmed the district court's refusal to allow class discovery and explained its holding as follows:

> Although in some cases a district court should allow discovery to aid the determination of whether a class action is maintainable, the plaintiff bears the burden of advancing a prima facie showing that the class action requirements of [Rule 23] are satisfied or that discovery is likely to produce substantiation of the class allegations. *Mantolete, supra*, 767 F.2d. at 1424.

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[5] Plaintiff falsely accuses Spherion of citing a red-flagged decision. (Oppo. p. 20:9-20). The case cited, *Del Campo v. Kennedy*, 336 F.R.D. 454 (N.D. Cal. 2006), is not a red-flagged decision and has no negative history. The case stands for the proposition for which it was cited: "plaintiff 'bears the burden of advancing a prima facie showing that the class action requirements of Fed.R.Civ.P. 23 are satisfied, or that discovery is likely to produce substantiation of the class allegations.'" *Id.* at 459.

In *Mantolete*, the only evidence that plaintiff offered in support of class discovery was two other complaints filed by similar plaintiffs in other jurisdictions. *Id.* at 1425. The Ninth Circuit found that:

> Such a showing [referring to the two complaints], however, does not furnish a compelling basis on which to conclude that the district court's refusal to grant expanded discovery for national class action treatment was an abuse of discretion. Nor does such a showing provide a likelihood that discovery measures will 'produce persuasive information substantiating the class action allegations.'" *Id.*

In the present case, Martinet offers even less than the plaintiff in *Mantolete* offered to substantiate his class allegations. Plaintiff offers absolutely no evidence – not even a self serving declaration – that tends to show that the Rule 23 class action requirements are satisfied or that the class discovery is likely to produce substantiation of his class allegations. In the absence of even a minimal prima facie showing, class discovery is not permitted in the Ninth Circuit. *Mantolete* is sound precedent in this Circuit and is directly applicable in this case.[6]

C. The Litany Of Distinguishable Class Cases Plaintiff Cites Are Unavailing.

Rather than submit a credible explanation for how class-wide discovery will support his allegations, plaintiff cites ad nauseum cases that bear no resemblance to the case he filed. There is nothing compelling about the fact that many wage-and-hour cases have been certified. This is no more enlightening than the fact that many wage-and-hour cases do not get certified or are decertified.[7] All cases of any kind have to satisfy Rule 23 to proceed as class actions.

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[6] Absent a prima facie showing under Rule 23, Martinet is not entitled to any class-wide discovery. The cases that plaintiff cites allowing statistical sampling (namely *Hill v. Eddie Bauer*, 242 F.R.D. 556 (C.D. Cal. 2007)), did not address the issue presently before this court. In *Hill*, defendant objected to the discovery based on confidentiality, privacy, undue burden, and overbreadth. *Id.* at 560. Defendant did not object to the discovery on the basis of *Mantolete* and did not argue that plaintiff had failed to make a prima facie showing under Rule 23.

[7] *Brown v. Federal Express Corp.*, WL 906517, *6-8 (C.D. Cal. Feb. 26, 2008) (denying class certification in California meal and rest period case); *Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 470 (S.D. Cal. 2007) (denying class certification as to California overtime, meal period, and wage statement and deduction claims); *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 641-642 (S.D. Cal. 2007) (denying class certification in California wage-and-hour overtime case); *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 253-254 (C.D. Cal. 2006) (denying class certification in putative class action for alleged violations of California's overtime and meal and rest period laws); *Walsh v. IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440, 1462-1463 (2007) (affirming decertification of class overtime and meal and rest period claims); *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1434 (2006) (affirming trial court order denying class certification on California wage-and-hour claims)

Plaintiff's Opposition proceeds on a strategy of volume over substance. Plaintiff apparently hopes that if he cites enough cases in which courts certified wage-and-hour class actions, the Court will gravitate to this body of case law and ignore the facts of the case at hand.

All of the cases that plaintiff cites share several common characteristics. First, all of these cases are against large corporations with cookie cutter operations (*e.g.*, Wal-Mart, Best Buy, Rite Aid, Papa John's, Circuit City, FedEx Kinkos, Eddie Bauer) or small corporations with uniform operations (*e.g.*, Chinese Daily News and Radec). Second, all of these cases have as their cornerstone uniform, company-wide policies and procedures. Third, none of these cases address the issue presently before this court, which is whether class-wide discovery is permitted where plaintiff has not made a prima facie showing of the class action requirements.

Spherion is not like any of the companies in the cases plaintiff cites. The evidence submitted in support of its Motion establishes Spherion does not have uniform policies and procedures like the defendants in those cases. Most importantly, unlike the plaintiffs in the cases cited, Martinet has not made a threshold showing to support his class allegations.

Plaintiff cites *In re Wal-Mart Stores, Inc. Wage and Hour Litigation*, 505 F. Supp. 2d 609 (N.D. Cal. 2007) ("*Wal-Mart*") and argues that the district court in that case "rejected nearly identical arguments made by Defendant in the case at hand." (Opposition 13:17-19.) Plaintiff's have mischaracterized the *Wal-Mart* decision. *Wal-Mart* addressed defendant's motion to dismiss and strike class allegations under Federal Rule of Civil Procedure 12. 505 F. Supp. 2d at 611. The case did not address class-wide discovery. There is no discussion of the law in the Ninth Circuit that requires plaintiffs to make a prima facie showing under Rule 23 and demonstrate that class discovery will substantiate class allegations. Neither of the parties made arguments concerning class discovery. The permissibility of class-wide discovery was simply not at issue in *Wal-Mart*.[8] This case – and the other inapposite case plaintiff cites – cannot stand for a proposition that they do not address.

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[8] *Wal-Mart* certainly did not address the nature or scope of class discovery. In dicta, the court mentioned that plaintiff should be given the opportunity to "make the case for certification based on appropriate discovery." But the issue of what constitutes "appropriate discovery" was not before the court. The issue before the court (whether class allegations were sufficient to withstand a Rule 12 motion) had nothing to do with class discovery.

In a footnote, plaintiff mentions that the court in *Wal-Mart* eventually certified a portion of the class. However, the subsequent decision certifying the class does not address the propriety, nature, or scope of class discovery. *See In re Wal-Mart Stores, Inc. Litigation*, 2008 WL 413749 (N.D. Cal. 2008). Moreover, the court's certification order reveals the hallmarks of a viable class case not present here, including a company-wide compensation system (*id.* at 2), uniform company-wide pay procedures (*id* at 3-4), and common payroll databases (*id.* at 5-6). The court's finding of predominance under Rule 23(b)(3) was based on "use of the records common to members of the proposed class." *Id.* at 13.

Unlike the plaintiffs in Wal-Mart, Martinet has not and cannot make any showing that there is any cognizable class among thousands of Spherion employees working at thousands of different job assignments with unique policies and procedures. Spherion is not operated or organized like Wal-Mart and Martinet's case bears no resemblance.[9]

In addition to relying on cases involving large monolithic corporations like Wal-Mart, plaintiff also cites cases on the other end of the spectrum involving very small employers with centralized operations. Plaintiff cites *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602 (C.D. Cal. 2005) for the proposition that employees in different job categories do not defeat commonality. *Wang* involved less than 200 employees of a Chinese newspaper company that operated out of a single office in Monterey Park. (*Id.* at 604.) Class discovery issues were not before the court. The court's certification order was based on a showing by plaintiff that "Defendant applied unlawful wage and hour-related policies to all members of the proposed class through a centralized management structure and that the application of those policies systematically deprived class members of their rights." (*Id.* at 608.) Martinet cannot make a similar showing here (not even a prima facie showing) because Spherion's does not have a centralized management structure and does not have a uniform set of policies that applied to all employees throughout the state.[10]

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[9] Plaintiff cites numerous inapposite cases involving highly standardized chain store operations like Wal-Mart. Two of the cases plaintiff relies on are not citable under Ninth Circuit Rule 36-3: *Whiteway v. FedEx Kinko's Office and Print Services, Inc.*, 2006 WL 2642528, 1 (N.D. Cal. 2006) ("*FedEx Kinko's*") and *Tierno v. Rite Aid Corp.*, 2006 WL 2535056, 2 (N.D. Cal. 2006) ("*Rite Aid*"). In these cases, the Northern District certified classes of store managers sharing the same job title, training, policies and procedures, and general responsibilities at "highly standardized chain store operations" throughout the state on the common question of whether the managers were properly classified as exempt employees. *FedEx Kinko's* at 1-2; *Rite Aid* at 5-6. Unlike these cases, Martinet has not and cannot identify a viable class of employees with the same or similar job titles, training, policies and procedures, and responsibilities.

The other chain-store cases plaintiff cites are similarly distinguishable. In *Kurihara v. Best Buy Co., Inc.*, 2007 WL 2501698 (N.D. Cal. 2007) the court certified a class to determine whether a "formal, company-wide policy" related to employee inspections violated California law. *Id.* at 6. In *Alba v. Papa John's USA, Inc.*, 2007 WL 953849, 1 (C.D. Cal. 2007) the court found common questions of law and fact predominated "because of the presence of standardized practices enforced from a central authority…") These cases are no help in a case against a company like Spherion, which has a splintered management structure and hundreds of different highly customized policies and procedures.

Spherion is not organized like any of the companies in the cases plaintiff cites. Spherion does not have uniform practices and procedures like these companies. Nor does it transact business like any of these companies. By relying on these cases, plaintiff has ignored the core issue on this motion. Spherion is not arguing that wage-and-hour cases are not amenable to class treatment. Nor is Spherion arguing that wage-and-hour cases are not subject to class-wide discovery. Spherion is arguing that the unique nature of its business and the unique facts of Martinet's case distinguish it from the run-of-the-mill class action cases certified against companies like Wal-Mart, Best Buy, or other cookie cutter retail businesses.[11] Plaintiff has ignored this argument altogether, hoping that the Court will be overwhelmed with a large volume of dissimilar and distinguishable cases where class certification was granted. The Court should not be sidetracked by these cases.

D. Plaintiff's PAGA Claim Must Comply With Rule 23.

Plaintiff argues that because there are no class action requirements set forth in PAGA (California Labor Code § 2698 et seq.), his claims under this statute are not subject to class

[10] Plaintiff cites *Mendez v. Radec Corp.*, 232 F.R.D. 78 (W.D.N.Y. 2005), which is also distinguishable. The case involved a small class of employees (70 opt-ins) who were subject to the "same unlawful policies" and a common practice or scheme. *Id.* at 91-92. In finding predominance, the court noted that plaintiffs were challenging polices "which have been applied in a more or less uniform fashion to Radec employees." *Id.* at 93.

[11] The case most analogous to Martinet's case is *Brown v. Federal Express Corp.* WL 906517 (C.D. Cal. 2008). This was a wage and hour class brought against Fed Ex on behalf of all its drivers, alleging missed meals and rest periods. (*Id.* at 1.) The court denied certification finding individual issues predominated over common questions. (*Id.* at 6-7.) The court emphasized the varying job duties of the drivers, varying experience levels, different work loads, different levels of monitoring, different routes, and different facilities throughout California with different management philosophies. (*Id.* at 6-8.)

certification requirements. Plaintiff forgets that he is in federal court. It is well established that the Federal Rules of Civil Procedure are to be applied by federal courts over conflicting state law. *Hanna v. Plumer,* 380 U.S. 460, 473-474 (1965). Rule 23 applies to cases brought in federal court even when state law affords a plaintiff the right to proceed independently. *See Ayers v. Thompson*, 358 F.3d 356, 375 (5th Cir. 2004).

The only federal case that Martinet cites on this issue, *De Simas v. Big Lots Stores, Inc.*, 2007 WL 686638 (N.D. Cal. 2007), actually establishes that Federal Procedural rules apply to PAGA claims. Plaintiff in that case argued that PAGA [Section 2699.3(a)(2)(c)] permitted plaintiffs to amend their complaint to add PAGA claims even though a Federal Rule of Civil Procedure 15 did not permit the amendment. *Id.* at 4. Citing *Hanna v. Plumer*, the court held that "pursuant to the Supremacy Clause, U.S. Const. art VI, cl. 2, the Federal Rules govern." *Id.* at 4. Martinet's PAGA claims are subject to Rule 23 requirements and Ninth Circuit procedural jurisprudence, including the holding in *Mantolete v. Bolger* discussed supra.

III. CONCLUSION

Spherion's Motion[12] established that the discovery Martinet seeks has no chance of supporting his class allegations and would require Spherion to expend over a half-million dollars on a fruitless fishing expedition. Plaintiff has failed to submit any evidence to the contrary. The Court should issue a protective order prohibiting class-wide discovery.

DATED: May 9, 2008

SEYFARTH SHAW LLP

By________________________

Brandon R. McKelvey
Attorneys for Defendant

[12] It was brought to Spherion's attention that there was a question as to whether defendant's opening brief and plaintiff's opposition exceeded the allowable 25 page limit. Defendant's opening brief was 22 pages, with a 4 page table of contents and authorities. Local Rule 7.1(h) does not address whether the table of contents and authorities is to be included in the motion length. The rule in at least one other district suggests that indices are not included within the page limit. *See, e.g.*, Central District, Local Rule 11-6.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF SACRAMENTO)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Seyfarth Shaw LLP, 400 Capitol Mall, Suite 2350, Sacramento, California 95814-4428. On May 9, 2008, I served the within documents:

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(c)

☐ I sent such document from facsimile machine (916) 558-4839 on May 9, 2008. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine (916) 558-4839 which confirms said transmission and receipt. I, thereafter, mailed a copy to the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed to the parties listed below.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at 400 Capitol Mall, Suite 2350, Sacramento, California 95814, addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by placing the document(s) listed above, together with an unsigned copy of this declaration, in a sealed Federal Express envelope with postage paid on account and deposited with Federal Express at Sacramento, California, addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made.

Executed on May 9, 2008, at Sacramento, California.

Elizabeth Holmes

Elizabeth Holmes